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No. 82-345

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

EDWARD COOPER, CITY ATTORNEY OF THE CITY OF SANTA ANA,
Petitioner,

VS.

MITCHELL BROTHERS' SANTA ANA THEATRE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party may present issues for certiorari in this Court, one year after the Court has denied certiorari on the same issues in the same case, and five months after the Court has denied a motion to permit leave to petition for re-hearing.

2. Whether California violates the United States Constitution by defining only the exhibition of obscene motion pictures as a public nuisance, and not the theater where such pictures are shown, nor the films themselves.

3. Whether the United States Constitution requires the State of California enact legislation providing city attorneys with attorney's fees in civil trials for public nuisances.

LIST OF PARTIES

Petitioner is the City Attorney of the City of Santa Ana, California, acting in his official capacity.

Respondents are Mitchell Brothers' Santa Ana Theater, a motion picture theater located in the City of Santa Ana, California, M B.F.G. Theatre Circuit, a division of Cinema 7, Inc., a California corporation, which operates the theater, Demich, Inc., a California corporation, James Mitchell and Artie Mitchell, of San Francisco, California, who are principal stockholders and controlling officers of the respondent corporations, and who are also the general partners in Mitchell Brothers Film Group, a California general partnership.

The other parties listed by the petitioner as respondents did not appear at trial nor in any of the myriad post-trial proceedings, and should not be included in this action.

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RESPONDENTS' BRIEF IN OPPOSITION

THE OPINION BELOW

The opinion of the Court of Appeal (Fourth Appellate District, Division 2 (following remand from this Court), is reported in 128 Cal.App.3d 937.

JURISDICTION

The opinion of the Court of Appeal (following remand from this Court) was filed on February 18, 1982. A timely petition for hearing in the California Supreme Court was filed on March 29, 1982. The California Supreme Court denied the petition on May 27, 1982. On June 3, 1982, the Court of Appeal filed its remittitur. This petition for cer-

tiorari was filed within ninety days from the date the judgment became final. Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1257(3) and Rules 17(b) and 17(c) of the U.S. Supreme Court.

STATEMENT OF THE CASE

This Court granted certiorari in this case in Docket No. 81-271, *Cooper v. Mitchell Brothers, etc.* (1981) — U.S. —, 102 S.Ct. 172, 70 L.Ed.2d 262, on the sole issue of standard of proof of obscenity in civil actions. The Court specifically denied certiorari on the other two questions presented.

Following summary reversal on that issue, the case was remanded to the California Court of Appeal which, in February 18, 1982, held that California did not have a stricter standard of proof than required by this Court's decision, and remanded the matter to the trial court for further proceedings. In all other respects it affirmed its first opinion. *People ex rel Cooper v. Mitchell Brothers', etc.* (1982) 128 Cal.App.3d 937.

Unsatisfied, petitioner sought hearing in the California Supreme Court and also, in April, 1982, submitted a motion to this Court for leave to file a petition for re-hearing, a motion which was denied. *Cooper v. Mitchell Brothers', etc.* (1982) — U.S. —, 102 S.Ct. 1779-1780.

The California Supreme Court denied the petition for hearing on May 27, 1982, and the Court of Appeal issued its remittitur to the trial court on June 3, 1982.

STATUTORY PROVISIONS INVOLVED

California Code of Civil Procedure:

§ 731. [Right to bring action to enjoin or abate nuisance, and to recover damages: Abatement of public nuisance]

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

Enacted 1872; Amended Stats 1905 ch 128 § 1.

§ 1021.5. [Attorney fees in cases resulting in public benefit]

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial

burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.

Added Stats 1977 ch 1197 § 1.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

THE QUESTIONS PRESENTED HAVE ALREADY BEEN RULED ON BY THIS COURT IN THIS CASE

Petitioner admits that he seeks review of the same questions which this Court declined to hear when the case first was presented in Docket No. 81-271. Petitioner is less than candid in failing to point out that he has also moved the Court for leave to file an out-of-time petition for re-hearing on these issues, a motion which was denied. *Cooper v. Mitchell Brothers', etc.* (1982) — U.S. —, 102 S.Ct. 1779-1780.

He states that there are two reasons why the Court should now take up these issues: changed circumstances, and refinement of the issues.

But the claimed changed circumstances are the same as those set forth in his earlier motion, that is, that the Court was denied the opportunity to rule on the issues when the appeal was dismissed in *U.S. Marketing, et al., v. Idaho* (1982) —— U.S. ——, 102 S.Ct. 1649, 79 L.Ed.2d 291. However, this Court denied certiorari in this case prior to any

decision in *U.S. Marketing*, so circumstances were not changed by that dismissal.

Nothing, in fact, has happened since the Court denied the motion to file a petition for re-hearing except that the California Supreme Court has refused a hearing on these issues after the California Court of Appeal issued its ruling on remand from this Court, a ruling that agreed on all points with this Court's decision in Docket Number 81-271. *See, People ex rel Cooper v. Mitchell Brothers', etc.* (1982) 128 Cal.App.3d 927. The circumstances remain exactly what they were when this Court first declined to review these questions.

As to the claim of "refinement" of the issues, petitioner is apparently referring to the fact that his brief is now longer than it was before, and therefore he asks the Court to hear this "better" version. If this Court should develop a policy of permitting a second hearing because the first brief was not sufficient, it will become the practice of unsuccessful petitioners to re-submit brief after brief until they finally get it right. Without question, many attorneys will swiftly adopt petitioner's practice of storing large chunks of text on word-processors to save the expense of having to actually re-write most of the second, third, and successive briefs.[1]

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[1]Note that all but four of the twenty-two pages of the "Statement of the Case" here are verbatim from the "Statement of Facts" in the first petition, Docket No. 81-271. Interestingly, and most probably mistakenly, the hundreds of pages of "Time and Motion Studies" in the instant petition are not copies of the first petition, but rather copies of those submitted in a series of copyright cases, this Court's docket numbers 81-2094 through 81-2096. Such practice certainly saves the petitioner time and expense but does little for those who must read both briefs.

There are no changed circumstances, merely making an argument lengthier does not refine it, and even if the issues were presented in a superior form, there are sound policy reasons for declining to permit a petitioner to present his case over and over again to this Court until he gets it right.

II

NO FEDERAL QUESTION IS PRESENTED BY THE CALIFORNIA DECISION ON REMEDIES FOR NUISANCE

The Court of Appeal's first decision, *People ex rel Gow v. Mitchell Brothers', etc.* (1981) 114 Cal.App.3d 923, which was affirmed in all particulars except the issue of standard of proof, *People ex rel Cooper v. Mitchell Brothers', etc.* (1982) 128 Cal.App.3d 937, 941, held that, "injunctive relief against those movies found to be obscene is the only remedy allowable under the public nuisance statutes." 114 Cal.App. 3d at 930. The decision is based on the legislation involved, and not on any federal question.

A. Under California's Public Nuisance Statutes, as Construed by the California Courts, It Is the Exhibition of Obscene Motion Pictures Which Constitutes the Nuisance, and Not the Theater Where Shown Nor the Films Themselves

Petitioner tries to raise the denial of all remedies but for injunctive relief to a constitutional level by claiming that the Court of Appeal based its denial on some theory of prior restraint. This, at best, is misleading. The Court of Appeal explained in its opinion that the city attorney, in seeking the additional remedies of theater closure, etc., misconstrued just what was the nuisance to be abated. It

is the *exhibition* of the films, and not the films or the theater which constitutes the public nuisance.

> "Once it is recognized that the public nuisance is nothing more than the act of exhibiting obscene films, it becomes apparent why all the remedies, save the injunction, are inappropriate." *People ex rel Gow v. Mitchell Brothers', etc.* 114 Cal.App.3d 932.

See, People ex rel Busch v. Projection Room Theater (1976) 17 Cal.3d 42, 51-52 and 57. There is certainly no federal question as to whether California has the right to make its own definition of what a public nuisance is.

Apparently under the hopes that something might work, the city attorney again, as in the petition in Docket 81-271, asserts in the Questions Presented that he has been denied his rights not only under the Fourteenth Amendment, but also the Ninth and Tenth Amendments, but makes no mention of the latter two provisions at any place in his argument. Perhaps he fears to do so as any such argument would be even more frivolous than those he has presented, and even he must beware the Court's censure.

B. In California Nuisance Actions, Money Damages Are Not Permitted Where the Plaintiff Is a Public Official

The California Court of Appeal pointed out that the basis for this case was California Code of Civil Procedure Section 731, which distinguishes between actions brought by private individuals and public officers. The Court said:

> "It is clear that the Legislature intended that one type of litigant could seek abatment *and* damages, while the other type of litigant could obtain abatement only. A city attorney, in an action, 'brought in the name of the People,' fits squarely and exclusively in the latter classification." *Id.*, 114 Cal.App.3d at 930.

The Court stated that the city attorney's efforts to liken himself to a private citizen, "border on the frivolous" *Id.*, 114 Cal.App.3d at 931.

C. There Is Neither Statutory Nor Constitutional Grounds for the Award of Attorney's Fees to a City Attorney in a California Action for Nuisance

The petitioner, a public officer acting in his official capacity as the city attorney of Santa Ana, California, again urges that he is to be treated as a private individual who fits within the parameters of those entitled to attorney's fees under the "private attorney general" theory of *Serrano v. Priest* (1977) 20 Cal.3d 25. That case held that where, as a result of the efforts of private individuals, state constitutional rights of societal importance were protected to the benefit of a large number of people, and where, in the circumstances of the case, the necessity for *private* enforcement placed upon the plaintiff a burden out of proportion to his individual stake in the matter, he may be awarded attorney's fees in the exercise of the court's equitable powers. *Serrano v. Priest, supra,* 20 Cal.3d at 46. Since the petitioner here is not a private individual, it is not necessary to discuss whether the result of his litigation was protection of important constitutional rights of societal importance.

The necessity that the successful party be a private citizen and not a public officer was made crystal clear by the California Legislature which, following the *Serrano* decision, codified the policy in Code of Civil Procedure Section 1021.5. That section, after setting forth the circumstances for an award of attorney's fees, provided:

"With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities. . . ."

A city attorney, bringing an action in the name of the People of the State of California, is simply not entitled to attorney's fees under the law of California and, again quoting from Justice Morris, this petitioner's efforts to liken himself to a private individual "border on the frivolous." *See, People ex rel Gow v. Mitchell Brothers', etc., supra*, 114 Cal.App.3d 923, 931.

Petitioner argues that this decisional and statutory law denies him, and the City of Santa Ana, equal protection of the law, but cites no authority for the proposition that such rights adhere to a governmental unit rather than an individual.

He next argues that denial of attorney's fees to him is the taking of property without due process of law, which must be one of the more specious arguments to be presented to this Court this Term. He doesn't explain who is doing the taking, or what the property is, but states that since private citizens cannot abate a moral nuisance (citing as authority two denials of certiorari in this Court, *Harmer, et al v. Deep Throat* (1977) 430 U.S. 907, and *Harmer, et al v. Devil in Miss Jones* (1977) 430 U.S. 937) it is a taking of property without due process to not give attorney's fees to a public official who does seek such abatement. Apparently his point is that if private individuals could seek abatement they would be entitled to attorney's fees (a questionable proposition at best) and therefore when public officials seek abatement they must be allowed attorney's fees under some constitutional provision. His cited authority is *Nebbia v. New York* (1934) 291 U.S. 502

and *Skinner v. Oklahoma* (1942) 316 U.S. 535. While it is certainly true that those two cases are landmark decisions on due process and equal protection, it is difficult to understand the relevance of milk board price controls and the sterilization of habitual criminals to the matter now before the Court.

Adding to the spurious character of the argument, the petitioner asserts that if he had not prevailed on the issue of standard of proof in this case, the Mitchell Brothers would have been entitled to attorney's fees against him under the authority of 42 U.S.C. Section 1983 and 1988. Naturally, he cites no authority for this novel idea.

CONCLUSION

It is respectfully requested that the Court deny the petition for writ of certiorari in all particulars.

Dated: September 16, 1982

Respectfully submitted,

ROBERT L. THORP
Counsel for Respondents